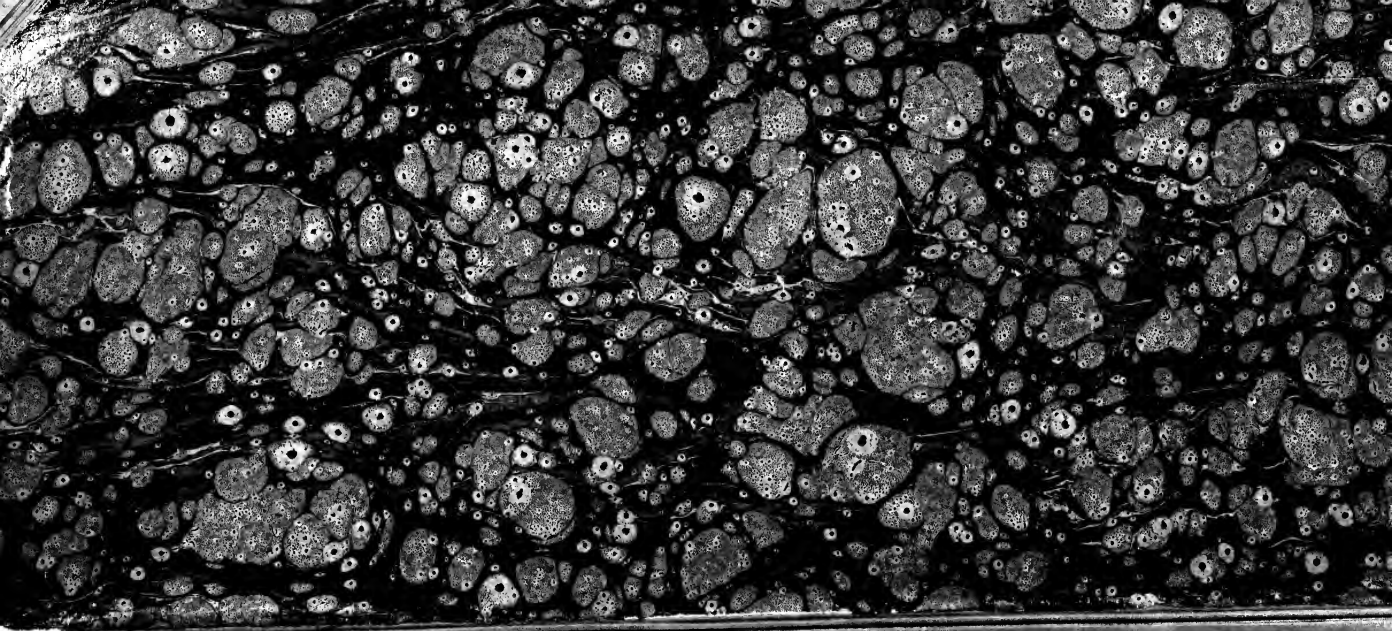

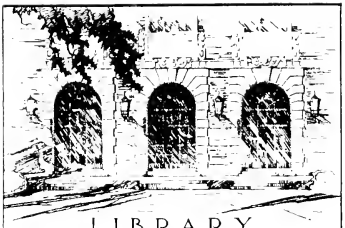

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A SECOND LETTER

TO

THE BISHOP OF EXETER.

BY A LAYMAN.

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LONDON:
PRINTED FOR THE AUTHOR BY
JOSEPH MASTERS, ALDERSGATE STREET.
MDCCCLI.

A LETTER.

My Dear Lord,

I trust I can now satisfy you that we have both been labouring under a great mistake for some time, and that after all no ecclesiastical rule can properly be said to have been violated by the judgment of the Privy Council in the Gorham Case, but that it is quite right that the Crown should have the jurisdiction in such a case which they have actually exercised.

The question then is this, What is the real nature of the suit called Duplex Querela? For a suit it is no doubt, (though I had at one time thought otherwise) and one too in the Archbishop's Court. You will find from our older authorities that the Archbishops of Canterbury in former times used to claim the right of interfering in their comprovincial dioceses per simplicem querelam, i.e. as I believe, of acting, so to speak, in all cases as joint ordinary with each Bishop throughout their province. This claim of jurisdiction is specially mentioned and discussed in Gibson's Codex. This right, however, was disputed and given up, and the jurisdiction was ultimately confined to those cases alone in which, after an application to the Comprovin-

cial Bishop, he had heard the Clerk and decided wrongly against him. This right the injured Clerk pursued by the process called the Duplex Querela, a process there is some reason to believe peculiar to the province of Canterbury, and arising from the legatine jurisdiction of that See,—as it is well known that the Archbishops of Canterbury anciently claimed to be legati nati of the Pope.* But whether this be so or not, it is clear that either on this ground or as metropolitans, they have always exercised this jurisdiction within their province. I cannot find any instance of the Archbishop of York doing this, which inclines me to this hypothesis of the legatine jurisdiction. If this be the nature of the Duplex Querela it is manifest that it consists really of two parts wholly separate and distinct from each other; one, a suit in the Archbishop's Court for the purpose of determining whether the Archbishop has in the particular case, this jurisdiction: and this depends on the question whether the Bishop has committed an error;—and secondly, a claim by the Clerk that if the Archbishop has jurisdiction he shall act or proceed to institute the Clerk as upon a presentation made to himself in his own diocese.

Now the suit, and of course the Appeal to the Privy Council, is, properly speaking, confined to the first branch alone. If the Archbishop decides against the Bishop, the latter then appeals to the

* This probably explains the saving of the jurisdiction of the Church of Canterbury in the 25th Henry VIII.

Crown to prevent the Archbishop from improperly infringing on his Diocesan rights, and if the Crown, upon argument before the Delegates or Privy Council, think the Bishop right they will by their judgment overrule the Archbishop and prohibit him thereby from proceeding. On the contrary, if they think the Bishop wrong, they will leave the Archbishop to proceed to the second branch, the consequence of his decision, and will direct him to act at his discretion in instituting the Clerk, if on examination he finds him fit.

Or suppose the Archbishop, agreeing with the Bishop, has dismissed the Clerk's suit in his Court. The Clerk then appeals to the Crown, and the Privy Council hear it. If they think the Bishop originally wrong in his refusal, and therefore that the Archbishop ought to have acted on his jurisdiction, they order him to proceed so to do, and he then proceeds, as in duty bound, to act as he would have done if the living were in the Diocese of Canterbury.

The Privy Council do not order the Archbishop to institute as a mere ministerial act; they have no jurisdiction to do that, but they have a jurisdiction to compel him to exercise his Archiepiscopal discretion in that case.

Now the very nature and course of the proceedings shows that this is so. The judgment is, that "*the suit be remitted to the Archbishop that right may be done.*" This cannot mean an order to institute *at all events*. The presentation itself is not

officially before the Privy Council at all, and consequently they do not judicially know of its existence. The meaning of the judgment must therefore be, that if presented (and why not if fit also?) he be instituted. And what does the Archbishop in his court proceed to do upon this? The first process is to summon the Bishop to bring in the presentation, which being THEN and not till then, before the Archbishop, he proceeds to exercise his discretion, as to institution, regularly. Now if this be not exercised by examination of the Clerk, these absurdities would follow. 1st, No provision would be made for heresy or crime committed *between the examination by the Bishop and the institution by the Archbishop*, and yet this interval may be one of many months or years. It would be obviously absurd to institute upon an *antecedent* supposed fitness, instead of a fitness properly ascertained *at the time of institution*. The solemn words of institution, accipe curam meam et tuam, would forbid such a conclusion. Besides, if the sufficiency of the examination before the Bishop is to be the sole criterion, in what way is an examination *merely frivolous, one which neither shows affirmatively nor negatives heresy or unfitness to be dealt with?* Such an examination would be indeed a perfectly sufficient warrant for the exercise of the Archbishop's jurisdiction, but would be manifestly insufficient for his institution of the Clerk. Indeed it might even open a door to fraud. For a Bishop knowing a man presented

to him was a heretic or ignorant person, and being desirous to favour him, though not willing himself to take the odium of institution, might reject him on some frivolous or insufficient pretence, and so deprive the Archbishop of all discretion in the matter, and throw on him the disgrace of instituting a manifestly insufficient clerk.

Again, another absurdity follows, if the law be not as above suggested. There is no authority for saying, that where the Archbishop on a presentation really to himself rejects the clerk, the latter has any remedy by duplex querela at all. It seems probable, therefore, that here the Archbishop's decision is final; but, if the judgment of the Privy Council, be a judgment ordering institution, it would follow that though the judgment of the Archbishop alone was final, his judgment when confirming that of the Bishop was not so. But, on the other hand, if the judgment of the Privy Council really be only that the Archbishop shall exercise his jurisdiction, the two cases become parts of one uniform and harmonious system. It is some confirmation of these views also, that in the case of a Quare Impedit, when the fitness of a clerk is alone the question before the court of law, which it sometimes is, it is pretty clearly laid down that the fitness in issue before the court, is not the fitness at the time of the refusal by the Bishop, but the fitness at the time of the certificate of the Archbishop. It is this

which is to decide the case. And this only takes place *if the clerk be living*, which circumstance clearly points to the conclusion that the Archbishop is to examine him personally and de novo, that he may be enabled to make that certificate.

I therefore, for all these reasons have come to the conclusion that after all the only effect of the judgment of the Privy Council was to send Mr. Gorham before the Archbishop of Canterbury, in order that he might judge, after examining him at his discretion, whether he, the Archbishop, thought him a fit person to be instituted to the living of Brampford Speke, and in that event only to institute him as on a presentation to himself. Now, if this be so, what ecclesiastical rule is violated by this proceeding? Ought not the Crown, as governing all estates of men, ecclesiastical or civil, within the realm, to decide on the one hand whether an Archbishop infringes the Diocesan rights of a Bishop, or on the other hand whether he refuses to give redress to a Clerk unjustly oppressed by the Bishop? Ought not the Crown to prohibit the Archbishop from proceeding in the one case, and to order him to act in the other; in the latter case however, not directing him what to do when he exercises this jurisdiction?

Thus, if the Chancellor dismisses a bill, and on appeal the House of Lords differ from him, they order him to proceed, but they do not direct him to decide in favour of the plaintiff. Here the Privy

Council order the Archbishop to proceed; but they do not direct him to institute Mr. Gorham.

This is my view of the case. If I am right, however, I may as well add, that the most improper person to have been present at the argument was His Grace of Canterbury, either as assessor or judge. For it was his duty to take no part till the question of his jurisdiction was first settled.

Before I conclude this letter, I will add a few words on the Royal Supremacy, a subject much talked of in these days, and often as it seems to me by persons who do not well understand its real import. Properly understood, there is nothing in it which need give any alarm to the most sensitive Churchman.

The King is with us the Supreme Head of the Church. But in what sense,—and what are the limits of this his Supremacy? He is Supreme Head of the State also—and the Oath of Supremacy puts both on the same footing.

Now to understand this properly, it will be well to divide this Supremacy both in Church and State into its two main branches—executive and legislative. Unless we do this, we shall fall into much error.

But before we discuss this question, let me call your attention to the important negative words of the Article and Oath of Supremacy, which in fact were the main reasons for framing it, and constitute its most important provision. We

thereby deny all Supremacy, whether spiritual, ecclesiastical, or temporal, to any external power. In this all true members of the Church of England agree without any restriction whatever. I regret, however, to be obliged to add that some of our soi-disant members seem disposed (as extremes are always found to meet) to attribute an absolute Supremacy to the Crown—as absolute in fact as that claimed by the Bishop of Rome over his subjects—and if established, as fatally leading to the corruption of our beloved Church, as it has already done to the corruption of the Church of Rome. If any one person is to exercise absolute power in the Church of CHRIST, it matters not much whether it be the King or the Pope. Indeed, if antiquity is to decide it, the latter would have the better claim. But both are contrary, as I believe, to primitive antiquity. Let us proceed then to examine in detail the true executive and legislative Supremacy of the Crown in this country.

The executive supremacy of the king over the Church gives him full power, as our Article expresses it, of "restraining with the civil sword all wrong doers," but no power of interfering in the ministrations of the Church. It is well put thus by the 25th of Henry VIII., c. 21, s. 19: "Provided always, That this Act, nor any thing or things therein contained, shall be hereafter interpreted or expounded, that your Grace, your nobles and subjects, intend by the same" (i.e., by denying the

Pope's power in England), "to decline or vary from the congregation of CHRIST's Church in any things concerning the very Articles of the Catholic Faith of Christendom, or in any other things declared by Holy Scripture and the Word of GOD, necessary for your and their salvations, but only to make an ordinance by policies necessary and convenient to repress vice, and for good conservation of this realm in peace, unity, and tranquillity, from ravin and spoil, insuing much the old ancient customs of this realm in that behalf; not minding to seek for any relief, succours, or remedies, for any worldly things and human laws, in any cause of necessity, but within this realm at the hands of your highness, your heirs and successors, kings of this realm, which have and ought to have an imperial power and authority in the same, and not obliged in any worldly causes to any other superior." These are plain and true words. No doubt King Henry and his successors claimed and exercised the complete executive power and judicial superintendence of the Church: in fact, all executive power, with one exception, mentioned in the Article on the supremacy, and which in a lively manner shows the limits. The ministry of GOD's Word and the Sacraments is a part of the executive duties of the Church. These the Article expressly excepts, showing that even in executive matters the king does not interfere where they are purely spiritual.

He claims to appoint the Bishops; but this is, I

conceive, according to the truth of the law, subject to examination as to fitness in some specific points and confirmation by the Church in the Archbishop's Court. If the Archbishop or the guardian of the spiritualities refused this confirmation, or refused to consecrate, or do any other ecclesiastical act, wilfully and unjustly toward the Bishop elect or towards any other persons entitled to have these ecclesiastical acts performed, the king, through his chancellor, was by a commission of delegates to examine judicially into the question of right, and if after deciding the question against the Archbishop and enjoining him to do the act, that prelate still refused to obey, the king punished him for his disobedience, but did not himself proceed to do the act. He then deputed the power of doing it to two other spiritual prelates, to be specially named for the purpose. This jurisdiction is even now occasionally exercised when upon the accidental incapacity of the Archbishop a commission is granted by the Crown to Bishops to consecrate a Bishop elect here, or as it may be now, in the colonies. For the act being spiritual, seems to have been thought ultra vires of the king himself. So little did the king ever dream of exercising personally or by lay judges what some ill-informed people have since ascribed to him, pontifical or spiritual power.

The executive ecclesiastical power, however, he did claim and did exercise. But this also he did only in the same way as he proceeds in civil

matters. He acted not personally, but by deputed judges. He determines ecclesiastical matters by ecclesiastical judges, as he does civil matters by civil judges. In both it is done by the law, a rule by which the king as well as the Church is bound. If it be a case of heresy, these judges are to ascertain what the law of the Church calls heresy and how it is to be punished. If they find the law, they apply it to the facts. But they do not make or pretend to alter the law: they have no power to do this. If they made as well as administered it, no man would be safe for a moment. To live subject to that would be to live under a pure despotism.

The only ground of complaint here is, if any, that unskilful and unlearned judges may be appointed. That is, if well founded, to be cured by appointing better. If laymen, from their course of reading and study or for any other reason, are unfit to be judges, then ecclesiastics should be selected for this purpose, as in former times they were, there being many instances in the books of Bishops sitting as delegates on ecclesiastical appeals. But the theory of the law is right, as it stands, as to the executive supremacy of the king.

Next we come to his legislative supremacy, which is not expressly touched at all by the oath of supremacy or the article on that subject. But it is understood no doubt in both. Here the supremacy is simply of order and rank, with one exception only (common to both civil and ecclesiastical supremacy), the power of

the initiative as well as the veto. No law can be discussed in convocation at all without the initiative of the Crown first granted. This prerogative exists, but is not universal, in civil matters. In them it is confined to particular subjects when brought before the parliament. The difference however is one of degree and not of principle. Subject to this exception the king has the very same and no greater power in convocation than in parliament. He has no power of making or changing laws in either, but he has the power in both of preventing by his veto any change from being made. By his coronation oath he binds himself expressly to observe this and all other privileges of the Church faithfully, and it would be a clear breach of that oath to assent in parliament to a law altering the doctrines or ritual of the Church, unless such alteration had been previously submitted to convocation for their assent, or the law itself made expressly subject to their subsequent approbation. Both parliament and convocation must unite as they did when the Act of Uniformity was passed, to make according to our constitution in Church and State such a law.

It is probable indeed that the discipline of the Church also falls within the same rule, and it may be well doubted, whether in propriety the Crown or the Bishops should ever assent to such bills unless subject to the same assent of Convocation, and in the late somewhat arbitrary powers given to the Bishops over Curates, it is at least clear that it

would have been but just if such powers had in some way been submitted to the judgment of the inferior Clergy in their lower House of Convocation, before they passed into a law. No doubt Parliament is unlimited in its power of legislation, *but the true, and I trust real, security that in cases like these, it shall be obliged to proceed constitutionally, is the Coronation Oath of the King, which binds in these cases his conscience as to the exercise of his parliamentary veto.*

Here then is the real legislative Supremacy of the King over the Church—as unobjectionable in reality, if exercised faithfully, as any law can be.

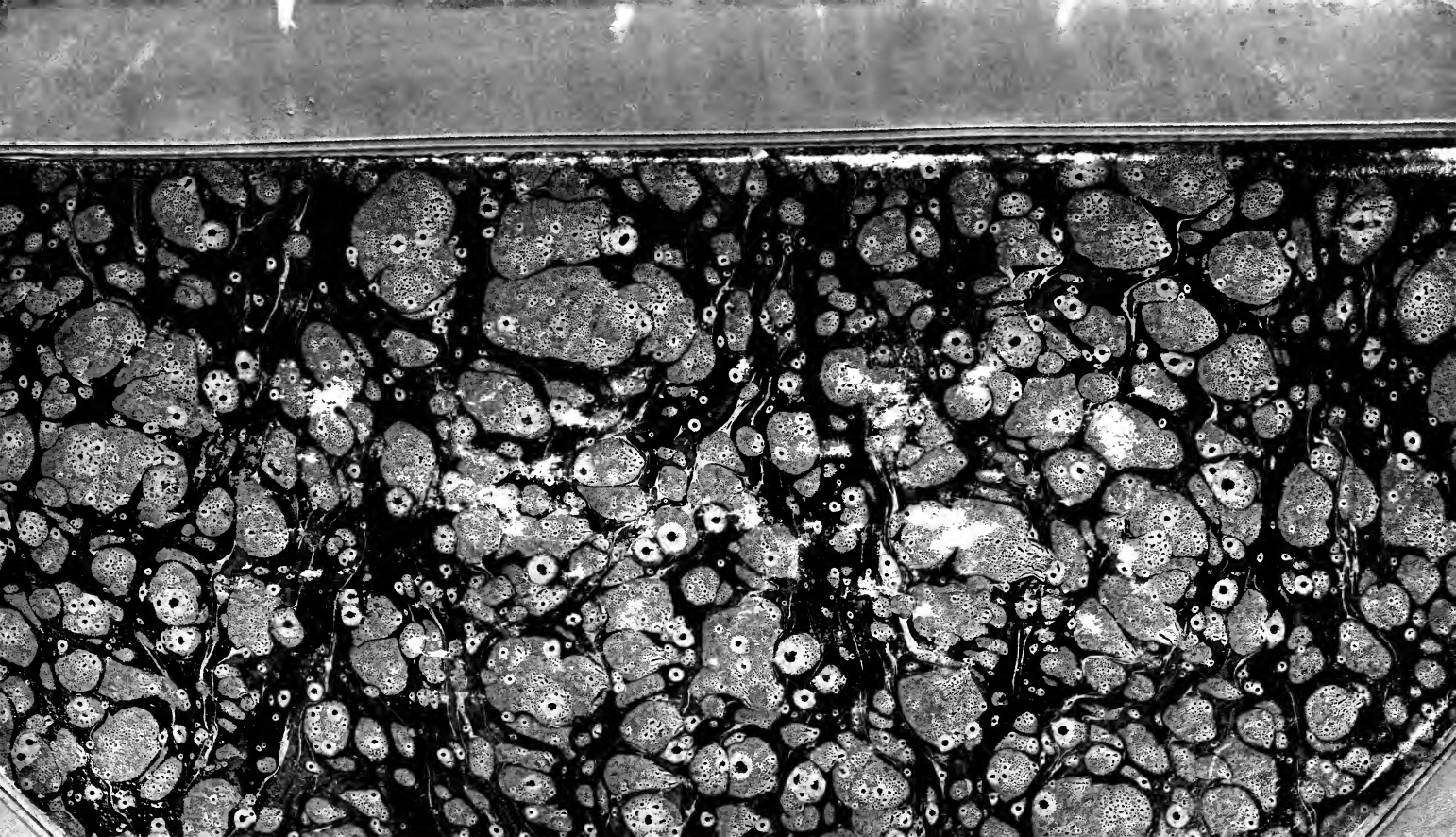
But there is an evil no doubt—and the real evil is this. The legislative power of the Church since Bishop Hoadley's days has fallen into complete abeyance. I do not stop to inquire whether there were not then good reasons for suspending it. Probably there were. But it is a necessary branch of our constitution, and the Crown ought to be advised occasionally to suffer the Convocation to deliberate on Church matters. There is no fear of abuse so long as the Crown retains the initiative as to all the subjects of debate. But no system of law can well stand which is not accompanied by a power of amending from time to time those errors to which all human institutions are liable, and which from changes of manners and habits become in time more and more apparent. A qualified employment of the Church Legislature is essential to the healthy action

of the English Church. Let me take the Gorham controversy as an instance. There was a decision of five Judges and two Archbishops, with one Judge and the Bishop of London dissenting, which overruled the opinion of the Bishop of Exeter, the diocesan, and that of the Judge of the Arches, Sir Herbert Jenner Fust. Surely that was a case in which the expressions of the written law were so doubtful, that a declaratory Act of Convocation to avoid such doubts in future, was, to say the least of it, very desirable. Again, with respect to discipline. Would it not be reasonable and decent at this moment for the Crown to ask the advice of the whole body of the Clergy as to the proper limits of Episcopal power over themselves, and the best mode of enforcing discipline and faithful obedience to the ritual of the Church? Would not this be far better, to say the least of it, than the late somewhat irregular proceeding of the majority of the Bishops in giving opinions without any jurisdiction to enforce them, and offering advice which every one is at liberty to follow or reject at his pleasure? And why might not her Majesty have been advised instead of sending a letter respecting Lord Ashley's monster petition to the Archbishop of Canterbury, to have referred that petition in a constitutional manner to Convocation, whose decision would have been of real value, inasmuch as it would have bound the Clergy by laying down a proper rule for their obedience? And how would Parliament be the worse for a little in-

formation on such subjects from those best acquainted with their details? The absence of this proper action of the Church renders indeed the presence of the Bishops in the Upper House, which impedes their usefulness as residents within their respective dioceses, imperatively necessary; and I will add, that until this is altered, the presence of the inferior Clergy in the Lower House ought not to have been prohibited, as it was within our own recollection. Perhaps however it would be better for both if they confined themselves to a healthy action in Convocation, and if both Houses consisted of laymen alone, and as a substitute for Ecclesiastical Peers or Members adopted as a standing order that no laws, relating to the doctrine, ritual, or discipline of the Church directly, should be passed until after or subject to the approval of Convocation. In this way both Bishops and Clergy would give to Cæsar, by abstaining from political questions altogether, the things of Cæsar, and to God, by retaining in spiritual matters the complete power of preventing all improper alterations in the Church—the things of God. On the other hand, the Parliament would not abdicate its supreme functions of legislation.

The laity, for it is the laity whom the Parliament (the King, Lords, and Commons) represents, have I apprehend right to prevent any changes in the established laws of Church in all matters whether of doctrine, discipline, or ritual—and the sole right of enforcing, *by the civil power*, all the injunctions of the Church.

Even the right of assenting to the calling Councils of the Church—and of allowing their decrees was not taken from the lay members of the Church, and was exercised by the supreme head of the state in their name. In this country it is exercised as to executive matters by the King, as to legislative matters by the King, Lords, and Commons in Parliament. Long may it continue to be so exercised. The confusion of these two separate powers of Church and State in the Papacy has been, I believe, the main cause of its unhappy corruptions. But this is too wide a field to enter upon, and requires a longer letter, and an abler correspondent.

Believe me,
My dear Lord,
Faithfully yours,
A Layman.

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